Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JACK M. WEBB, Special Deputy Receiver for Employers National Insurance Company in Receivership,

Petitioner,

v.

B.C. ROGERS POULTRY, INC. and B.C. ROGERS PROCESSORS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does this Court's opinion in *Quackenbush v. Allstate Insurance Company* stand for the proposition that an action seeking damages never warrants abstention, despite significant precedent upholding abstention under *Burford v. Sun Oil Company* in similar actions involving an insurance company that is also the subject of an ongoing state receivership proceeding?

II. Is a claim for *quantum meruit* an equitable action based upon which a district court may exercise its discretion to remand a case to state court pursuant to the *Burford* abstention doctrine?

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Petitioner, Jack M. Webb, Special Deputy Receiver for Employers' National Insurance Company in Receivership, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, which gives rise to this petition, is reported at *Webb v. B.C. Rogers Poultry, Inc., et al.*, 174 F.3d 697 (5th Cir. 1999) and reprinted in the Appendix hereto ("App. A"). The remand order of the United States District Court for the Western District of Texas, Austin Division, dated February 19, 1998 is not published, but is reprinted in the Appendix hereto ("App. B").

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 21, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The McCarran-Ferguson Act provides, in pertinent part, as follows:

> The Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011.

The McCarran-Ferguson Act further provides, in pertinent part, as follows:

> **(a) State regulation.** The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> **(b) Federal regulation.** No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act . . . and the Act of October 15, 1914, as amended, known as the Clayton Act . . . and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended . . . shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012 (internal citations omitted).

Article 21.28 of the Texas Insurance Code is reprinted in the Appendix hereto ("App. D").

STATEMENT OF THE CASE

To fully appreciate the significance of the questions presented by this case, it is essential to consider the background of the receivership of Employers' National Insurance Company ("ENIC") and the background of this case in the courts below.

A. Background of the Receivership of ENIC.

On February 11, 1994, the State of Texas declared ENIC to be insolvent and brought a receivership action against ENIC in the 53rd Judicial District Court of Travis County, Texas (the "State Receivership Court"). Pursuant to the Texas Insurance Code, the State of Texas obtained a Permanent Injunction and Order Appointing Permanent Receiver (the "Permanent Injunction"), which is reprinted in the Appendix hereto ("App. C"). The Permanent Injunction found that ENIC was "insolvent and in a hazardous financial condition," and appointed the Commissioner of Insurance of the State of Texas as the Permanent Receiver and Jack M. Webb ("Receiver") as Special Deputy Receiver of ENIC. *See* App. C at 36a, 47a, 51a. The Permanent Injunction also enjoined any person from interfering with the receivership proceedings or the acts of the Receiver, and from taking any action involving the Receiver outside of the State Receivership Court. *See id.* at 44a, 46a-47a. Further, the Permanent Injunction expressly provided that any lawsuits regarding assets of ENIC must be filed in the State Receivership Court. *See id.*

B. Background of the Litigation between the Receiver and B.C. Rogers.

On behalf of the policyholders and creditors of ENIC, the Receiver sued B.C. Rogers Poultry, Inc. and B.C. Rogers Processors, Inc. (collectively referred to as "B.C. Rogers") in the State Receivership Court for unpaid workers compensation insurance premiums asserting alternative causes of action for breach of contract, *quantum meruit*, or suit on sworn account. B.C. Rogers removed the lawsuit to federal court. The Receiver filed a Motion to Abstain and

Remand based, in part, on the fact that, because this action concerns the State of Texas' regulation of an insolvent insurance company in receivership, it should be determined in the State Receivership Court pursuant to the abstention doctrine set forth in *Burford v. Sun Oil Company*.[1]

On February 19, 1999, the United States District Court for the Western District of Texas, Austin Division, granted the Motion to Abstain and Remand and ordered this cause be remanded to the State Receivership Court (the "Remand Order"). The Court specified that its decision to grant the motion was based on the *Burford* abstention doctrine and held that:

> this lawsuit is simply one of many efforts the receiver engages in to obtain the assets of an insolvent insurance company and to protect the policyholders and the citizens of the State of Texas from injury. The State of Texas is the primary authority for regulating the insurance industry in the State of Texas and Jack Webb, as Special Deputy Receiver, has the court-appointed authority to protect the State of Texas from the insolvency of Employers National Insurance Company, which includes the obtaining of any assets of Employers National Insurance Company. Abstention is appropriate in this case, for if this Court were to exercise federal jurisdiction, it could well interfere with the State of Texas' efforts to effect a coherent policy on a matter of public concern, that is, the collection of assets of an insolvent insurer through a state district court

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1. 319 U.S. 315 (1943).

> receivership proceeding wherein the state district court retains continuing jurisdiction over the liquidation proceeding. Failure to abstain could lead to removal of cases to federal court and possible changes of venue, leaving the receiver facing litigation in several forums and under different circumstances. This would be detrimental to the overall scheme of the liquidation proceedings in Texas when an insurance company becomes insolvent.

See App B at 33a.

B.C. Rogers appealed the Remand Order and argued that, under this Court's opinion in *Quackenbush v. Allstate Insurance Company*,[2] an action seeking damages never warrants abstention. The Receiver presented three counter-arguments that: (a) notwithstanding the *Quackenbush* opinion, long-standing and well-grounded precedent supports abstention in cases involving insolvent insurance companies that are, at the same time, involved in ongoing receivership proceedings; (b) the *Quackenbush* opinion does not impose a *per se* bar to abstention of a case involving a claim for damages; and (c) *quantum meruit* is an equitable action based upon which a district court may exercise its discretion to remand a case to state court based on the *Burford* abstention doctrine.

After considering the parties' briefs and argument of counsel, the United States Court of Appeals for the Fifth Circuit decided, on a vote of 2 to 1, to reverse the Remand Order. As evidenced by the split vote and as further described

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2. 517 U.S. 706 (1996).

below, the panel members differed sharply in their opinions and reasoning. The majority and dissenting opinions below were entered on May 21, 1999 and issued as a mandate on June 14, 1999.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE MAJORITY OPINION BELOW CONFLICTS WITH FEDERAL STATUTE AND THE STATE OF TEXAS' COMPREHENSIVE STATUTORY SCHEME TO REGULATE ITS INSURANCE BUSINESS.

The Receiver's petition should be granted because the majority opinion below, that this case properly belongs in federal court, conflicts with federal statute, as well as the State of Texas' coherent and comprehensive statutory scheme for regulating its insurance business, which includes insurance companies that become insolvent.

Insurance companies are not eligible for the protections afforded by the United States Bankruptcy Code. 11 U.S.C. § 109(b)(2). Instead, federal law, namely the McCarran-Ferguson Act,[3] assigns primary responsibility for regulating the insurance industry to each individual state. *United States Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993).[4]

3. 15 U.S.C. §§ 1011-1015.

4. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-30 (1946) (stating that "obviously Congress' purpose [in enacting the McCarran-Ferguson Act] was broadly to give support to the existing

(Cont'd)

Insolvent insurers are, therefore, subject to the comprehensive oversight of state administrative agencies and courts. *Id.*

In accordance with the McCarran-Ferguson Act, the Texas Legislature has established a comprehensive scheme to regulate the insurance business in Texas. This scheme mandates administrative procedures to be followed in the event of an insurance company's insolvency. *See* TEX. INS. CODE art. 21.28 (App. D) (setting forth general procedures for the liquidation, rehabilitation, reorganization or conservation of insurers); *see also* TEX. INS. CODE art. 21.28-A (relating to insurer delinquencies, prevention of insurer delinquencies, and supervision of insurers, proceedings, conservatorships, and liquidations); TEX. INS. CODE art. 21.28-C (relating to the Texas Property and Casualty Insurance Guaranty Fund and its obligations in the event of insolvency).[5] Furthermore, once an insurance company is declared insolvent, mandatory and exclusive

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(Cont'd)

and future state systems for regulating and taxing the business of insurance" and that Congress achieved that purpose by "declaring expressly and affirmatively that continued state regulation and taxation of [the insurance] business is in the public interest . . ."); *see also Western and Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 653 (1981) (declaring that the "unequivocal language of the McCarran-Ferguson Act [that 'the business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business'] suggests no exceptions").

5. *See also* App. A at 25a-27a, 28a and n.20-30, 34 (citing and discussing pertinent statutory provisions regarding regulation of insurance companies and concluding that "[i]t is abundantly clear that Texas indeed has established a coherent policy in this area").

venue for all proceedings involving the receivership is in the District Court of Travis County, Texas. *See* TEX. INS. CODE art. 21.28 §§ 2(i), 3(h) and 4 (App. D at 60a, 66a-67a, 68a-73a).

As recognized and explained by the Fifth Circuit in *Munich American Reinsurance Company v. Crawford*, such consolidation of actions in a state receivership court:

> prevents the unnecessary and wasteful dissipation of the insolvent company's funds that would occur if the receiver had to defend unconnected suits in different forums across the country.... Consolidation also eliminates the risk of conflicting rulings, piecemeal litigation of claims, and unequal treatment of claimants, all of which are of particular interest to insurance companies and policy holders, who are often relying on policies with the same or similar provisions.... Thus, consolidation, enforced through injunctions, conserves the insurance company's assets for ultimate payment to policyholders as well as other creditors.

141 F.3d 585, 593 (5th Cir.), *cert. denied sub nom, American Re-Insurance Co. v. Crawford*, __ U.S. __, 119 S. Ct. 539 (1998) (internal citations omitted). Moreover, in *Clark v. Fitzgibbons*, a post-*Quackenbush* Fifth Circuit court held that allowing a separate federal court action to proceed concurrently with the state insolvency proceeding would usurp the state's control over the liquidation proceeding, and "defy common sense, as well as notions of comity and the national policy embodied in the McCarran-Ferguson Act." 105 F.3d 1049, 1051, 1052 (5th Cir. 1997).[6]

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6. In an attempt to distinguish the *Clark* case because it does not address the issue of whether a request for damages precludes (Cont'd)

The majority opinion below would hold that – despite the McCarran-Ferguson Act, the State of Texas' comprehensive statutory scheme for regulating the insurance business including insolvent insurance companies, the ongoing proceeding involving ENIC in the State Receivership Court, and the Fifth Circuit's post-*Quackenbush* recognition of the state's prevailing interest in overseeing insurance receivership proceedings – this case belongs in federal district court. Such a conclusion directly contradicts and conflicts with common sense, the governing federal and state statutes, and the pervasive policy considerations involved therein.

As Judge Politz correctly concludes:

> Congress delegated the regulation of the business of insurance to the states, and Texas has created a complex and comprehensive scheme to do exactly that. The Texas legislature has concentrated judicial review of insurance proceedings in Travis County, and consequently those courts, like the Department of Insurance and the Commissioner of Insurance, have developed a specialized knowledge regarding these proceedings. . . . Finally, Texas requires the receiver to 'take such steps as may be necessary to conserve the assets . . . for the purpose of liquidating . . . the affairs of the insurer.'

(Cont'd)
remand under *Quackenbush*, (*see* App. A at 9a n.9), the majority opinion below, instead, reinforces Receiver's position that, notwithstanding the type of relief sought in a particular lawsuit, the governing statutes and overriding policy concerns control application of abstention doctrines.

> By holding that the federal district court possessed jurisdiction over this case, the majority potentially sacrifices one of the chief purposes of the Texas regulatory scheme by effectively requiring the 'dissipation of the insolvent company's funds' likely to result from litigation conducted outside Travis County and away from the court with the responsibility for this insurance company salvage operation. Splintering a portion of this on-going [receivership] proceeding and insisting on jurisdiction herein for the federal district court unduly threatens the scheme enacted by Texas as specifically authorized by Congress.

See App. A at 27a-29a.

In sum, by reversing the district court and allowing this case to continue in federal court, the Fifth Circuit has created law that directly conflicts with the McCarran-Ferguson Act, as well as the State of Texas' comprehensive statutory scheme to regulate the insurance business in Texas. The majority opinion below effectively usurps the control granted by federal statute to the State of Texas to control receivership proceedings, guts the comprehensive statutory scheme enacted by the Texas Legislature to regulate its insurance industry, and destroys the Receiver's ability to carry out his court-ordered and statutorily mandated duties. For these reasons, the Receiver's petition should be granted.

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE MAJORITY OPINION BELOW CONFLICTS WITH WELL-GROUNDED AND LONG-STANDING PRECEDENT SUPPORTING *BURFORD* ABSTENTION IN SIMILAR CASES.

The Receiver's petition should be granted so that the Court may confirm that the *Quackenbush* opinion does not stand for the proposition that an action seeking damages never warrants abstention, and affirm the importance of significant precedent upholding *Burford* abstention in actions involving an insurance company that is concurrently involved in state receivership proceedings.

A federal court may refuse to exercise jurisdiction over a case and defer the matter to a state court with concurrent jurisdiction. *Burford*, 319 U.S. at 317-18. This abstention principle, known as the *Burford* doctrine, is designed to prevent federal courts from interfering with specialized state regulatory schemes. *See Sierra Club v. City of San Antonio*, 112 F.3d 789, 796 (5th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 879 (1998) (explaining that the "*Burford* abstention doctrine is particularly appropriate where 'by proceeding the district court would have risked reaching a different answer than the [state] institutions with greater interest in and familiarity with such matters' ").

Prior to *Quackenbush*, the Fifth Circuit, as well as other district and circuit courts, consistently approved abstention under the *Burford* doctrine in cases involving insolvent insurers concurrently involved in ongoing receivership

proceedings.[7] The majority opinion below intimates, however, that *Quackenbush* rendered this vast body of precedent worthless based on a bold conclusion that "the Court determined that an action seeking damages never warrants abstention." *See* App. A at 6a.

Contrary to assertions made in the majority opinion below, in *Quackenbush,* this Court specifically refused to follow a rigid *per se* rule for applying the *Burford* doctrine based simply on the category of relief sought. 517 U.S. at 730. Instead, the Court pronounced that:

> Ultimately, what is at stake is a federal court's decision, based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the 'independence of state action,' . . . that the State's interests are paramount and that a dispute would best be adjudicated in a state forum.

Id. at 728 (internal citation omitted).

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7. *See Munich Am. Reins. Co.*, 141 F.3d at 589 n.2 (citing collected precedent); *see also Barnhardt Marine Ins., Inc. v. New England Int'l Surety of Am., Inc.*, 961 F.2d 529, 531-32 n.4 (5th Cir. 1992) (noting that, at the time, with only one exception, the Federal Courts of Appeals agreed that federal courts should abstain from becoming involved in insurance company liquidation proceedings and citing collected authority); *see, e.g., Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 703-04 (10th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *Gonzalez v. Media Elements, Inc.*, 946 F.2d 157 (1st Cir. 1991); *Hartford Casualty Ins. Co. v. Borg-Warner Corp.*, 913 F.2d 419, 426 (7th Cir. 1990); *Lac D'Amiante du Quebec, Ltee v. American Home Assurance Co.*, 864 F.2d 1033, 1045 (3rd Cir. 1988); *Dykhouse v. Corporate Risk Management Corp.*, 961 F.2d 1576, 1992 WL 97952 at *3 (6th Cir. 1992) (per curiam) (unpublished op.—text in Westlaw).

Additional support for this argument is found in the recent opinion in *DeMauro v. DeMauro*, wherein the First Circuit likewise interprets the *Quackenbush* holding to mean "that abstention, under *Burford* or otherwise, may be appropriate in suits for damages." 115 F.3d 94, 98 (1st Cir. 1997). Similarly persuaded that this Court did not intend for its opinion in *Quackenbush* to "torpedo" a district court's ability to abstain when appropriate under the *Burford* doctrine, Judge Politz focused on the traditional balance of state and federal concerns, which forms the basis for the solid background of precedent upholding *Burford* abstention in situations similar to the case at hand. *See* App. A at 24a-29a.

The Receiver's petition should be granted so that the Court may confirm that the *Quackenbush* opinion does not stand for the proposition that an action seeking damages never warrants abstention, and affirm the importance of significant precedent upholding *Burford* abstention in actions involving an insurance company that is concurrently involved in state receivership proceedings.

III.

THE PETITION SHOULD BE GRANTED BECAUSE THE MAJORITY OPINION BELOW CONFLICTS WITH A PRIOR DECISION OF THE SECOND CIRCUIT.

The Receiver's petition should be granted because the majority opinion below, that *quantum meruit* is strictly an action at law and, therefore, will not support abstention, conflicts with a prior decision from the Second Circuit.

Although the majority opinion below string cites various state court opinions purportedly supporting the proposition that a claim for *quantum meruit* is strictly an action at law, it wholly fails to address how any federal circuit court has previously answered the question – is a claim for *quantum meruit* an equitable action or, rather, an action at law? The Second Circuit recently answered that question by expressly providing that "*quantum meruit* is an equitable remedy." *McNamee, Lochner, Titus & Williams, P.C. v. Higher Educ. Assistance Found.*, 50 F.3d 120, 125 n.1 (2nd Cir. 1995).

The Receiver's petition should be granted so that this Court may resolve the conflict created by the majority opinion below and prior case law emanating from the Second Circuit.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT'S OPINION CONFLICTS WITH PRIOR DECISIONS OF THE TEXAS SUPREME COURT.

The Receiver's petition should be granted because the majority opinion below, that *quantum meruit* is strictly an action at law and, therefore, will not support abstention, conflicts with prior decisions of the Texas Supreme Court.

As the majority opinion below correctly recognizes, "Texas courts have noted the equitable nature of *quantum meruit*." *See* App. A at 12a and n.13 (citing collected authority from Texas and other states). In particular, the Texas Supreme Court has, on at least two occasions, expressly provided that a claim for *quantum meruit* arises in

equity. *See Vortt Exploration Co. v. Chevron U.S.A.*, 787 S.W.2d 942, 944 (Tex. 1990) ("*Quantum meruit* is an equitable remedy"); *Truly v. Austin*, 744 S.W.2d 934, 938 (Tex. 1988) ("Recovery in *quantum meruit* is based on equity").

The Receiver's petition should be granted so that this Court may resolve the conflict created by the majority opinion below and prior opinions by the State of Texas' highest court.

V.

THE PETITION SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL ISSUE THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Receiver's petition should be granted because the Fifth Circuit, by way of the majority opinion below, has decided an important federal issue – whether a claim for *quantum meruit* is an equitable action supporting abstention by a federal court – that has not been, but should be, settled by this Court.

Neither the *Quackenbush* opinion nor any subsequent opinions issued by this Court address whether a claim for *quantum meruit* is an equitable action that will support abstention under the *Burford* doctrine in the context of a concurrent state receivership proceeding. If left unsettled, the majority opinion below will provide the only applicable case law and, effectively, turn the State of Texas' regulatory scheme and its governance of insolvent insurance companies on its ear. The Receiver's petition should be granted to address such an important federal issue in this case of first impression.

CONCLUSION

This case first presents a question of exceptional importance to the state judiciary, as well as the federal bench – does this Court's opinion in *Quackenbush v. Allstate Insurance Company* stand for the proposition that an action seeking damages never warrants abstention, despite significant precedent upholding *Burford* abstention in similar actions involving an insurance company that is also the subject of an ongoing state receivership proceeding? The only sensible answer to this question is "no."

If the majority opinion below is allowed to stand, the State of Texas' comprehensive statutory scheme for regulating its insurance business and, in particular, insolvent insurance companies will be severely and adversely affected. The regulatory regime adopted and enforced by the State of Texas provides for the orderly and fair resolution of claims by or against an insolvent insurer. Parallel federal and state proceedings would only serve to disrupt Texas' legislative framework for the liquidation of insolvent insurers, like ENIC. Moreover, granting the Receiver's petition will give this Court a much-needed opportunity to clarify its opinion in *Quackenbush*, which, as evidenced by the vastly contrasting opinions of the Fifth Circuit panels members, has caused a great deal of confusion in the three years since it was issued. Upon granting the Receiver's petition, this Court may confirm that the *Quackenbush* opinion does not stand for the proposition that an action seeking damages never warrants abstention, and affirm the importance of significant precedent upholding *Burford* abstention in actions involving an insurance company that is concurrently involved in state receivership proceedings.

This case also presents an equally important second question for resolution – is a claim for *quantum meruit* an equitable action based upon which a district court may exercise its discretion to remand a case to state court pursuant to the *Burford* abstention doctrine? Because this question remains unanswered by this Court and has produced different answers in the various lower courts, the Receiver's petition should be granted so that this Court may resolve the conflict between the majority opinion below and prior opinions issued by the Second Circuit court and the Texas Supreme Court.

Accordingly, the Receiver respectfully requests that his petition for writ of certiorari be granted.

Respectfully submitted,

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